Later this defect was cured *ab initio* under statutory provision. *Held*, that the acts of the receiver are valid. *Matter of New York, W. & B. Ry. Co.*, 193 N. Y. 73. See NOTES, p. 369.

CORPORATIONS — STOCKHOLDERS: INDIVIDUAL LIABILITY TO CORPORATION AND CREDITORS — RIGHT OF SET-OFF. — The plaintiff obtained a judgment against the defendant corporation and the execution was returned *nulla bona*. A bill in equity was then brought to enforce a stockholder's liability for unpaid stock in satisfaction of the judgment. *Held*, that the stockholder may set off against such liability a *bona fide* indebtedness of the corporation to himself. *Austin Powder Co.* v. *Commercial Lead Co.*, 114 S. W. 67 (Mo., St. L. Ct. App.).

It is well settled that the liability of the stockholders on unpaid stock is an asset of an insolvent corporation available to the creditors through a bill in equity after the remedies at law have been exhausted without satisfaction. *Hickling* v. *Wilson*, 104 Ill. 54. And when proceedings are taken to wind up a corporation or to take an account of its assets for a rateable distribution among all the creditors, a stockholder cannot set off against his statutory liabilities or his liability on unpaid stock any debt of the corporation to himself. *Shickle* v. *Watts*, 94 Mo. 410, 418; *Matter of Empire City Bank*, 18 N. Y. 199, 227. To allow him to do so would be to give him a preference as creditor by reason merely of his position as stockholder. But where an individual judgment creditor is seeking equitable execution against the liability for unpaid stock as a corporation asset, it seems just to allow the stockholder to set-off such indebtedness; for the petitioning creditor is no more entitled to a preference than is the stockholder. *Christensen* v. *Colby*, 43 Hun (N. Y.) 362.

CRIMINAL LAW — TRIAL — PRESENCE OF ACCUSED IN CAPITAL CASE AT RENDITION OF VERDICT. — The accused, who was indicted for murder, was on bond. When the case was given to the jury he left the court room, and before his return the jury rendered a verdict of guilty of manslaughter. *Held*, that the receiving of the verdict in the absence of the prisoner is reversible error. *Sherrod* v. *State*, 47 So. 554 (Miss ).

In non-capital felonies it has been frequently held that the prisoner may waive his right to be present at the rendition of the verdict. *State* v. *Kelly*, 97 N. C. 404. *Contra*, *Prine* v. *Commonwealth*, 18 Pa. St. 103. The distinction taken by the court in the principal case between capital and other cases seems artificial. It is argued that the accused and the public are more interested in his life than in his liberty. But in neither case has the right to be present at the verdict any practical value; for a conclusion is reached before the jury returns. The arguments against waiver are essentially historical. One is that the court can have no jurisdiction over the accused if he is at large. *Andrews* v. *State*, 2 Sneed (Tenn.) 550. Another is that the jury ought to see the prisoner. *Rex* v. *Ladsingham*, T. Raym. 193. These considerations apply today with equally much or little force to capital and to non-capital crimes. One rule should, accordingly, cover both cases, and that rule is conceived to be the better which limits the opportunities for merely technical reversal. See 11 HARV. L. REV. 409; 15 *ibid.* 412.

DAMAGES — MEASURE OF DAMAGES — EXTENSION OF ENGLISH RULE IN CONTRACTS FOR SALE OF REALTY. — The plaintiff and the defendant made a contract whereby the defendant was to have free access to certain tips, to take and carry away therefrom, at a specified rate per ton, such quantity of slag as he might desire. The plaintiff was unable to perform, for want of title to the slag. In an action brought by him, the defendant counterclaimed for this breach. The trial court found that the slag had become part of the ground itself. *Held*, that the defendant can recover only nominal damages on his counterclaim. *Morgan* v. *Russell & Sons*, 25 T. L. R. 120 (Eng., K. B., Nov. 26, 1908).

In suits for breach of contract to sell land, the majority of courts in this

country do not depart from the general rule allowing the vendee to recover substantial damages. *Hopkins* v. *Lee*, 6 Wheat. (U. S.) 109. In England, however, an exception is made in such contracts if the vendor, whether in good or bad faith, refuses to perform because he has no title; for he is then liable only in nominal damages. *Bain* v. *Fothergill*, L. R. 7 H. L. 158. The same rule prevails in Pennsylvania. *Burk* v. *Serrill*, 80 Pa. 413. In a few states nothing less than fraud, bad faith, or misconduct, subjects the vendor to liability in substantial damages. *Margraf* v. *Muir*, 57 N. Y. 155. In others, however, mere knowledge by the vendor of his inability to give good title makes him so liable. *Plummer* v. *Rigdon*, 78 Ill. 222. The English doctrine was early applied to a contract for the sale of a term for years. *Pounsett* v. *Fuller*, 17 C. B. 660. And the reasons given for its establishment apply with equal force to the present decision which brings within the rule a contract for the sale of a *profit à prendre*. See *Bain* v. *Fothergill*, *supra*.

DAMAGES — MEASURE OF DAMAGES — SUBSTANTIAL PERFORMANCE OF BUILDING CONTRACT. — A, having substantially performed a building contract, sued B for the agreed price. B counterclaimed for defects in performance. *Held*, that the measure of the defendant's compensation is the reasonable cost of remedying the defects that are practically remediable, and such further sum as will measure the actual diminished value of the structure because of defects not so remediable. *Forller* v. *Heintz*, 118 N. W. 543 (Wis.).

Although modern cases generally allow a recovery on a building contract substantially performed, there has been no consistent rule in measuring compensation to the owner for defects. The measure has been stated to be the difference in value between substantial performance and perfect performance. *Wagner* v. *Allen*, 174 Mass. 563. Also the defendant's compensation has been computed from damage sustained by reason of the defects. *Kane* v. *Stone Co.*, 39 Oh. St. 1. But as there may be no difference in value and no actual damage, the owner might get no compensation whatever, although not getting what he contracted for. Where the owner is allowed what would make good all defects in performance a fairer result is reached. *Feeney* v. *Bardsley*, 66 N. J. L. 239. This is an application of the first part of the Wisconsin rule. But if remedying a slight defect would entail a grossly disproportionate expense the contractor would have only a barren recovery. In such circumstances the latter part of the Wisconsin rule would apply. On the whole, the rule in the principal case would seem to work justice everywhere.

EMINENT DOMAIN — COMPENSATION — RESERVATION OF CLAIM FOR INJURIES TO STRUCTURES. — A leased from B two lots upon which he erected structures for an entire plant. On condemnation of one lot for public purposes A surrendered his lease to B with all claims for damages except such as he had by reason of injuries to structures on the remaining lot. In the condemnation proceedings A claimed the damages so reserved. *Held*, that he may recover. *Matter of City of New York*, 193 N. Y. 117.

On condemnation of land by eminent domain proceedings, the compensation is apportioned between the landlord and the tenant according to their interests. *Dyer* v. *Wightman*, 66 Pa. St. 425. See *Harris* v. *Howes*, 75 Me. 436. And where part of an entire tract is taken the measure of damages includes the resulting diminution in value of the residue. *South Buffalo Ry. Co.* v. *Kirkover*, 176 N. Y. 301. Thus it has been held that a lessee may recover for diminution in value of his leasehold and fixtures through condemnation of a portion of the property. *Phila., etc., R. R. Co.* v. *Getz*, 113 Pa. St. 214. In the present case the surrender prevented any damage in respect to the leasehold. But the reservation of the claim for damages to the structures is in effect an agreement that their title shall remain in the former tenant. Hence compensation for their depreciation is rightly awarded him. Because easements are regarded as inseparable from the dominant estate, a grantor, in spite of a reservation in his deed, cannot recover damages for their invasion after the grant. *McKenna* v. *B. U. El. R. R. Co.*, 184 N. Y. 391. But recovery can be had for